CHAIN CYCLE SDN BHD

v.

GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[ORIGINATING SUMMONS NO: 24C (ARB)-7-10-2013]
21 AUGUST 2014

ARBITRATION: *Award - Setting aside - Application for - Reference on questions of law - Whether court should disturb findings of facts by arbitrator - Whether arbitrator carefully evaluated evidence and applied correct principles of law - Whether court's intervention required - Whether there was breach of natural justice - Whether arbitration award set aside - Arbitration Act 2005, ss. 37 & 42*

CONTRACT: *Performance - Doctrine of substantial performance - Whether there was substantial performance of contract - Whether there was breach that went to root of contract - Whether condition precedent existed in contract*

The Government of Malaysia ('defendant'), entered into a contract with Chain Cycle Sdn Bhd ('plaintiff') for the design, construction, completion, testing and commissioning and guarantee for a solid waste treatment plant ('the contract'). The treatment plant was to employ a revolutionary technology called thermal oxidation process that was proprietary to the plaintiff. The price of the contract was a lump sum figure of RM21,910,600, which was subsequently increased through variations to RM28,497,042.53 ('the contract sum'). The contract contained certain performance specifications for the treatment plant, relating to the daily capacity of the plant to treat a specified tonnage of unsorted municipal waste, the duration of each burn and the rate of consumption of natural gas. The waste characteristics were specified in the contract, and had been determined by the Malaysian Institute of Nuclear Technology Research ('MINT'). MINT was appointed by the defendant as its consultant to observe the testing and commissioning of the plant. After the plant was constructed, it underwent its first testing and commissioning in May 2003. The plant failed to meet the performance specifications at this first testing. Certain design modifications were made to the plant and the plant underwent a second testing and re-commissioning in May 2004. Again, the plant failed to meet the performance specifications at the re-commissioning. The defendant subsequently terminated the contract pursuant to cl. 53.1(iii) of the contract, and the parties referred their dispute to the arbitrator. In the arbitration proceedings, the arbitrator made a finding of fact that the waste processed during the re-commissioning was outside the parameters of the waste characteristics specified in the contract. The

plaintiff claimed that this contributed to the failure of the plant to meet the performance specifications during re-commissioning. The plaintiff declined to undertake further testing and commissioning following a disagreement over who should bear the costs of such testing. The arbitrator made a final award on 15 July 2013 which included the defendant's counterclaim in the sum of RM9,328,770. Dissatisfied, the plaintiff referred certain questions of law to the court pursuant to s. 42 of the Arbitration Act 2005 ('the Act') and also sought for the award to be set aside pursuant to s. 37 of the Act, on the ground that the arbitrator relied on cases that had not been put to the parties for their comments. As such, it was argued that the arbitrator had breached the rules of natural justice. On the contrary, the defendant submitted that the arbitrator's findings and awards were based on the assessment of the evidence and factual findings. As such, it would not be open to the court to review such findings of fact by the arbitrator. The questions of law that were referred to the court, *inter alia,* were (i) whether the plaintiff, having completed all the physical works called for under that contract, was entitled to the balance of the revised lump sum contract price of RM28,497,042.53, amounting to RM2,730,664.22; (ii) whether the defendant, having pleaded counterclaim for damages in the sum of RM13,000,000 had to prove the quantum of damages claimed; (iii) whether the proper measure of damages for breach of contract resulting in a defective plant was the cost of reinstatement or the diminution in value; (iv) whether it was allowed to calculate the measure of damages based on diminution in value or loss of utility by reference to the replacement cost of an item or part of a complex structure; (v) whether the contract between the parties was in fact a research and development project wherein the defendant assumed the risk of the technology not performing as expected; (vi) whether it was a condition precedent to the contractual performance that waste within the specified characteristics and parameters be provided for testing the functionality of the plant; and (vii) whether it was a condition precedent that a proper testing and commissioning of the plant as prescribed by cl. 46 of the contract be carried out.

Held (varying arbitration award pursuant to s. 42(4) of the Arbitration Act 2005; reducing amount awarded in respect of counterclaim to RM4,619,385):

(1) For the court to intervene, the finding of the arbitrator must be one that was outside the range of possible correct answers at which a tribunal, correctly applying the law to the facts, could have arrived. The arbitrator was correct in coming to the conclusion that where a contractor committed a breach that goes to the root of the contract, it would not be open for the contractor to argue that there had been substantial performance of the contract. Clause 46.2 of the contract contemplated that the contractor was under an obligation to

take necessary measures to ensure that the tests are passed. Until such tests are passed, the installation could not be considered to be completed. Therefore, the arbitrator was entitled to come to the conclusion that the satisfaction of the performance specifications went to the root to the contract, and that accordingly, there was no substantial performance of the contract. As there had been no error of law, the quantum of damages ascertained by the arbitrator should stand. (paras 27, 30, 33 & 35)

(2) The defendant had the burden of proving the fact and the amount of damages on the counterclaim before it may recover substantial damages. However, the arbitrator erred in law by selecting diminution in value as the measure of damages because he considered it difficult to ascertain the reinstatement costs. The arbitrator was entitled to select diminution in value or loss of amenity as a measure of damages because it was the most reasonable measure of damages. The most appropriate measure of damages would be reinstatement costs, which would be the cost to either replace or modify the primary and secondary chambers in order for the plant to meet the performance specifications. (paras 37 & 47)

(3) The arbitrator appeared to distinguish "utility" from mere "amenity" in way that suggested that the loss of utility was greater than a loss of amenity. The loss of utility connoted the loss of use of goods in one or more ways whereas, the mere loss of amenity simply affected one's personal enjoyment of the goods without affecting its value. It was not necessary for the law to be extended in this way, as a loss of utility in the manner suggested would necessarily result in a diminution of value of the goods. (para 55)

(4) There was nothing in the cited cases that supported the proposition that the exception in *Absalom Ltd v. Great Western (London) Garden Village Society, Ltd* ('*Absalom* exception') no longer applied in Malaysia post *Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd*. Therefore, question (v) was a question of construction of contract which was a question of law and which had been referred to arbitration for consideration. No interference by the courts was possible on grounds that the decision on the question of law was an erroneous one. (para 66)

(5) A term of a contract need not be referred to or expressly set out as a "condition precedent" for it to be effective as a condition precedent. The key issue was construing the intent of the parties in including the term in question. The parties could not have intended the plaintiff to deliver a waste treatment plant that conformed to the performance specifications to be excused if the waste characteristics

did not conform to Table 4.3. The waste characteristics prescribed by Table 4.3 were not conditions precedent, but must instead be read to form an integral part of the performance specifications for the plant. Although the arbitrator had erred in taking the view that because the contract was a turnkey or design and build contract, the plant must therefore be capable of handling waste of whatever nature. This error had no bearing that the provision of waste within the specified characteristics and parameters was not a condition precedent for testing the functionality of the plant. (paras 77, 80 & 83)

(6) The arbitrator had not erred in law by concluding that the contract was lawfully terminated pursuant to cl. 53.1(iii) of the contract. The said clause clearly entitled the employer to terminate the contract if the contractor refused to perform its obligations under the contract. Therefore, the arbitrator was entitled to conclude, *inter alia*, that the contract had been lawfully terminated on grounds that the plaintiff had repudiated the contract. (para 95)

(7) Order 7 r. 2(1A) of the Rules of Court 2012 ('ROC 2012') required an originating summons to state in its intitulement the provision of the written law under which the application to court was being made. Similarly, O. 69 r. 4(1)(d) required an originating summons for an arbitration claim to specify the section of the Arbitration Act 2005 under which the claim was made. A wrong intitulement in a summons rendered the summons irregular. However, such irregularity was subject to the curative powers of the court under O. 2 r. 1 of the ROC 2012. This was an appropriate instance for the exercise of the curative powers of this court under O. 2 r. 1 of the ROC 2012. (paras 102, 104, 105 & 107)

(8) For the court to intervene under s. 37(1)(b) of the Act, the plaintiff must show that it had suffered prejudice by the actions of the arbitrator. The correct proposition was not that "any denial of natural justice is a prejudice", but rather that there must be prejudice for there to be a breach of natural justice. The plaintiff had not been prejudiced by the fact that the arbitrator referred to the cases without giving the parties an opportunity to consider those cases. Therefore, the plaintiff's application under s. 37(1)(b) of the Act to set aside the arbitral award was dismissed. (paras 112, 113 & 115)

Case(s) referred to:

Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***

Chartbrook Ltd v. Persimmon Homes Ltd [2009] 1 AC 1101 ***(refd)***

Dowans Holding v. Tanzania Electric Supply Co [2011] EWHC 1957 (Comm) ***(refd)***

Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd [2014] 1 AMR 253 ***(foll)***
Ganad Corporation Bhd v. Flobright Trading Sdn Bhd & Anor [2000] 1 LNS 117 HC ***(refd)***
Ganda Edible Oils Sdn Bhd v. Transgrain BV [1987] 2 CLJ 394; [1987] CLJ (Rep) 95 SC ***(refd)***
Hoenig v. Isaacs [1952] 2 All ER 176 ***(refd)***
Investor Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98 ***(refd)***
Kershaw Mechanical Services Ltd v. Kendrick Construction [2006] EWHC 727 ***(refd)***
London Underground Ltd v. Citylink Telecommunications Ltd [2007] EWHC 1749 (TCC) ***(refd)***
Mannai Investment Co Ltd v. Eagle Star Assurance Co Ltd [1997] AC 749 ***(refd)***
Methanex Motunui Ltd v. Spellman [2004] 1 NZLR 95 ***(refd)***
Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157 ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Re Chrysalis [1983] 1 WLR 1469 ***(foll)***
River Wear Commissioners v. Adamson [1877] 2 App Cas 743 ***(refd)***
Ruxley Electronics and Construction Ltd v. Forsyth [1995] 3 All ER 268 ***(refd)***
Sapiahtoon v. Lim Siew Hui [1963] 1 LNS 118 HC ***(refd)***
Swainland Builders Ltd v. Freehold Properties Ltd [2002] 2 EGLR 71 ***(refd)***
Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***
The Government of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC ***(refd)***
Voon Nam Kwong & Anor v. Selamat Maju Jaya Sdn Bhd [2002] 6 CLJ 453 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 37(1)(b), 42(1A), (4)(b), (d)
Rules of Court 2012, O. 2 r. 1, O. 7 r. 2(1A), O. 69 r. 4(1)(d)

For the plaintiff - CW Lim (Loshini with him); M/s Skrine
For the defendant - Chandra Devi (Nur Irmawatie with her); SFCs

Reported by Sandra Gabriel

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] The plaintiff, Chain Cycle Sdn Bhd, has referred ten questions to this court, questions that it regards as being questions of law. These questions arose out of a final arbitration award dated 15 July 2013 delivered by the arbitrator, Mr Chong Thaw Sing.

[2] In addition, the plaintiff has applied for the award of the arbitrator to be set aside for breach of natural justice.

[3] The applications by the plaintiff are made pursuant to ss. 42 and 37 of the Arbitration Act 2005.

Background Facts

[4] On 7 January 2001, the defendant, the Government of Malaysia, entered into a contract with the plaintiff for the design, construction, completion, testing and commissioning and guarantee for a solid waste treatment plant ('the contract'). The plaintiff was the contractor under the contract and the defendant the employer. This treatment plant was to be located in Labuan and was to employ a revolutionary technology called thermal oxidation process ('TOP') that was proprietary to the plaintiff.

[5] In essence, TOP involves a two-step combustion of waste. Municipal waste is combusted in a primary chamber, which converts it into gas, which is then burnt off at very high temperatures in a secondary chamber. The high temperatures attained in the secondary chamber of the plant ensures that hazardous gasses are removed from its emissions, dispensing with the need for expensive pollution control systems. The primary fuel of the plant was natural gas.

[6] The price of the contract was a lump sum figure of RM21,910,600, which was subsequently increased through variations to RM28,497,042.53 ('the contract sum'). It was not disputed that, of the contract sum, RM25,766,378 has been paid by the defendant to the plaintiff.

[7] The contract contained certain performance specifications for the treatment plant, relating to the daily capacity of the plant to treat a specified tonnage of unsorted municipal waste, the duration of each burn and the rate of consumption of natural gas. The burn and fuel consumption specifications were expressed to be dependent on the characteristics of the incoming waste. The waste characteristics were specified in the contract, and had been determined by the Malaysian Institute of Nuclear Technology Research ('MINT'), based on a survey conducted between November 1999 and July 2000.

[8] MINT was appointed by the defendant as its consultant to (*inter alia*) observe the testing and commissioning of the plant. The contract itself was administered by KLIA Berhad, which had been appointed by the defendant as its project management consultant. The defendant also appointed Malaysia Airports Berhad to act as its environmental impact assessment consultant.

[9] After the plant was constructed, it underwent its first testing and commissioning in May 2003. The plant failed to meet the performance specifications at this first testing. Certain design modifications were made to the plant and the plant underwent a second testing and re-commissioning in May 2004 ('the re-commissioning').

[10] The plant again failed to meet the performance specifications at the re-commissioning. In the arbitration proceedings, the arbitrator made a finding of fact that the waste processed during the re-commissioning was outside the parameters of the waste characteristics specified in the contract. The plaintiff claimed that this contributed to the failure of the plant to meet the performance specifications during re-commissioning.

[11] The plaintiff declined to undertake further testing and commissioning following a disagreement over who should bear the costs of such testing.

[12] The defendant subsequently terminated the contract pursuant to cl. 53.1(iii) of the contract, and the parties referred their dispute to the arbitrator. As mentioned, the arbitrator made a final award on 15 July 2013. The plaintiff has now referred questions of law to this court and has also sought to set aside the award on grounds that there has been a breach of natural justice during the arbitral proceedings or in connection with the making of the award.

The Applications By The Plaintiff

[13] The plaintiff has referred to this court the following questions of the law pursuant to s. 42 of the Arbitration Act 2005:

(i) Whether on a true construction of the contract between the parties, the plaintiff, having completed all the physical works called for under that contract, was entitled to the balance of the revised lump sum contract price of RM28,497,042.53, amounting to RM2,730,664.22; and/or

(ii) Whether it was incumbent on the defendant, having pleaded counterclaim for damages in the sum of RM13,000,000 to prove the quantum of damages claimed; and/or

(iii) Whether the proper measure of damages for breach of contract resulting in a defective plant is the cost of reinstatement or the diminution in value; and/or

(iv) Arising from the above, if the proper measure of damages is the cost of reinstatement, then, if that cost is not proven, is a tribunal entitled to award costs based on diminution in value, or is it confined to awarding nominal damages; and/or

(v) Whether it is allowable to calculate the measure of damages based on diminution in value/loss of utility by reference to the replacement cost of an item or part of a complex structure; and/or

(vi) Whether on a true construction, the contract between the parties was in fact a research and development project wherein the defendant assumed the risk of the technology not performing as expected; and/or

(vii) Where a contract that specifies that municipal waste of specified characteristics and parameters is to be treated and also specifies the amount to be treated and the limits of energy consumption, is it a condition precedent to contractual performance that waste within the specified characteristics and parameters be provided for testing the functionality of the plant; and/or

(viii) Question (viii) has been withdrawn by the plaintiff.

(ix) Whether it was a condition precedent to determination of the contract pursuant to cl. 53.1(iii), that a proper testing and commissioning of the plant as prescribed by cl. 46 of the contract, be carried out; and/or

(x) Whether the arbitrator failed to direct his mind to the contractual requirement that a proper testing and commissioning of the plant was a condition precedent to determination of the contract by the defendant and failed to make a finding that the testing and re-commissioning that was purported to have been carried out from 10 May 2004 to 17 May 2004 under the supervision and direction of KLIA Berhad on behalf of the defendant was not a proper cl. 46 testing and commissioning; and/or

(xi) If the re-commissioning was not proper, was the purported determination of the contract based on the results of the improper testing and commissioning, valid?

[14] The plaintiff has also applied for the award to be set aside pursuant to s. 37 of the Arbitration Act 2005, on the ground that the arbitrator relied in his analysis in the award on cases that had not been put to the parties for their comments, and in so doing the arbitrator breached the rules of natural justice.

[15] References to the "plaintiff" or "Claimant" shall be to Chain Cycle Sdn Bhd, as the plaintiff in the current action. "Defendant" or "respondent" means the Government of Malaysia.

[16] The application under s. 42 of the Arbitration Act 2005 and the questions of law posed to this court are addressed in the following paras. 17 to 99 of this judgment. The s. 37 application is dealt with at paras. 100 *et seq*. Paragraphs 110 *et seq* set out the orders granted by this court and a summary of my findings.

The Application Under s. 42

[17] The question for this court to consider in exercising its powers under s. 42 of the Arbitration Act 2005 is whether or not it should intervene to provide any of the remedies prescribed by s. 42, in the event that there is an error of law arising from the arbitral award. Section 42(1A) provides that this court may intervene in relation to any question of law that substantially affects the rights of one or more of the parties.

[18] The effect of s. 42(1A) has been analysed in great detail in the judgment of Nallini J in *Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd*[1], which now represents the law in Malaysia on the applicable test to be applied to determine pursuant to s. 42 whether an error of law had arisen in an arbitral award. The proper test, as approved in *Exceljade*, is that set out in the judgment of Mustill J in *Re Chrysalis*[2]:

> ... Starting therefore with the proposition that the court is concerned to decide on the hearing of the appeal whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages: (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.
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> In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
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> Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of

A law in those cases where a correct application of the law to the facts would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven to assume that he did not properly understand the principles which he had stated.

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Whether stage (3) can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case. *Pioneer Shipping Ltd v. BTP Tioxide Ltd* [1982] AC 724 and *Kodros*
C *Shipping Corporation v. Empresa Cubana de Fletes (No. 2)* [1983] 1 AC 736, show that where the issue is one of commercial frustration, the court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of
D investigating whether the arbitrator has gone wrong at the second stage. But once the court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award.

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[19] This is the test that I will apply in considering the questions of law. I now consider each question of law that has been posed to this court.

F *Question (i): Whether on a true construction of the contract between the parties, the plaintiff, having completed all the physical works called for under that contract, was entitled to the balance of the revised lump sum contract price of RM28,497,042.53, amounting to RM2,730,664.22*

[20] This question arises out of paras. 115 to 128 of the award. The
G plaintiff claimed that the arbitrator erred in his conclusion that the plaintiff was only entitled to RM586,153.07 rather than RM2,730,664.22, being the unpaid amount of the contract sum. The plaintiff argued that there has been substantial performance of the contract by the plaintiff, and therefore it should be entitled to the balance
H of the contract sum.

[21] Although the arbitrator had found that, as a matter of fact, the plaintiff had physically completed an operable thermal oxidation process plant, he was of the view that there was no substantial completion of the contract.

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[22] The plaintiff's case was that the arbitrator erred in law by failing to take into account the legal principles relating to substantial completion of a contract and that the award should for this reason be set aside.

[23] The defendant's response was that the issue of the balance of the contract sum was decided by the arbitrator in his award based on the assessment of the evidence and/or factual findings of the arbitrator and that accordingly it will not be open to this court to review such findings of fact by the arbitrator.

[24] It is important to note that what is in issue is not the finding by the arbitrator that there was no substantial completion. That is a question of fact, which is not open to this court to review. Rather, the plaintiff's case was that the arbitrator had erred in law because he failed to take into account the legal principles relating to the doctrine of substantial performance.

[25] The arbitrator set out the law relating to the principle of substantial completion in paras. 82 and 84 of the award. I am satisfied that he had correctly identified the law in this regard, which now brings me to the next question: did the arbitrator correctly apply the law to the facts?

[26] In para. 85 of the award, the arbitrator acknowledged that the plaintiff had completed an operable plant, that the process of handing over had commenced, that MINT had deemed the plant as having been commissioned and that the department of environment had granted the necessary licence for the operation of the plant. Nonetheless, despite these findings of facts, the arbitrator came to the conclusion that there was no substantial completion. The key finding by the arbitrator is set out in para. 86 of the award:

> ... the term on 'testing and commissioning' in this Contract is very clearly a mandatory requirement to be fulfilled before the Plant is fit for handing over to the Respondent. Clause 46.2 of the Contract emphasized the mandatory nature of the testing and commissioning by prescribing the action required of the Contractor if the plant fails to pass the test. This underscores that the failure to meet the performance specifications goes to the root of the Contract.
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> ...
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> Without the handing over of the plant to the Respondent, there is no substantial completion and the claimant is not entitled to the full balance of the contract sum.

[27] Applying the test in *Re Chrysalis*: for this court to intervene, this finding of the arbitrator must be one that I consider to be outside the range of possible correct answers at which a tribunal, correctly applying the law to the facts, could have arrived. That I would not have come to the same conclusion myself is immaterial.

[28] The law relating to the principle of substantial performance is expressed succinctly by Denning LJ in *Hoenig v. Isaacs*[3]:

> ... the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the Courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions and is usually calculated by the cost of making them good.

[29] *Hoenig v. Isaacs* has been cited with approval and applied by the Malaysian courts: see *Sapiahtoon v. Lim Siew Hui*[4] and *Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor*[5].

[30] From the passage extracted above, I am of the view that the arbitrator was entirely correct in coming to the conclusion that, where a contractor commits a breach that goes to the root of the contract, it will not be open for the contractor to argue that there had been substantial performance of the contract. The *ratio* in *Hoenig* is this: where a breach by the contractor is not one that goes to the root of the contract, the doctrine of substantial performance will apply to require the employer to pay for the price of the contract. The converse must necessarily also be correct: where the breach is one that does go to the root of the contract, the doctrine of substantial performance will not apply, and the employer will not be obliged to pay the contracted price.

[31] The next question is therefore whether the arbitrator had erred in concluding that "the failure to meet the performance specifications goes to the root of the contract".

[32] The relevant clause identified by the arbitrator is cl. 46.2 of the contract:

> **46.2 Failure to Pass Tests**
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> In the event the installation failing to pass these tests, the Contractor should take such measures as are necessary to remedy the installation including the replacement of part or whole of the equipment installed, so as to pass all necessary tests. **The whole installation shall not be considered as complete until all such tests have been passed**. (emphasis added)

[33] Clause 46.2 contemplates that the tests must be passed, and that the contractor is under an obligation to take necessary measures to ensure that the tests are passed. It further states that, until such tests are passed, the installation cannot be considered to be complete.

[34] Having regard to cl. 46.2 and its effects, I am satisfied that the arbitrator would have been entitled to come to the conclusion that the satisfaction of the performance specifications goes to the root to the contract, and that accordingly, there was no substantial performance of the contract.

[35] As there has been no error of law, the quantum of damages ascertained by the arbitrator at paras. 120-128 of the award, being a question of fact, shall stand. Question (i) of the questions of law posed to this court is therefore answered in the negative.

Question (ii) Whether it was incumbent on the defendant, having pleaded counterclaim for damages in the sum of RM13,000,000 to prove the quantum of damages claimed

[36] Questions (ii) to (v) arise out of paras. 141 to 160 of the award. The plaintiff claims that the arbitrator failed to apply settled principles of law in deciding that the defendant had proven the counterclaim in the sum of RM9,328,770.

[37] The answer to the question of law posed in question (ii) is simple: the plaintiff in any action must prove the quantum of damages. Accordingly, the defendant, as the plaintiff in the counterclaim, has the burden of proving the fact and the amount of damage on the counterclaim before it may recover substantial damages.

[38] The arbitrator correctly identified the applicable laws in citing the following passage from the judgment of Edgar Joseph Jr J in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd*[6]:

A It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

B Thus nominal damages may be awarded in all cases of breach of contract. (See *Marzetti v. Williams* [1830] 1 B & Ad 415. And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See, for example, *Dixon v. Deveridge* [1825] 2 C & P 109 and *Twyman v. Knowles* [1853] 13 CB 222.

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[39] Question (ii) of the questions of law posed to this court is answered in the affirmative. This answer, however, has no particular bearing on the award itself. I now consider the issue of the measure of damages applied by the arbitrator.

D *Question (iii) Whether the proper measure of damages for breach of contract resulting in a defective plant is the cost of reinstatement or the diminution in value*

Question (iv) Arising from the above, if the proper measure of damages is the
E *cost of reinstatement, then, if that cost is not proven, is a tribunal entitled to award costs based on diminution in value, or is it confined to awarding nominal damages?*

Question (v) Whether it is allowable to calculate the measure of damages based on diminution in value/loss of utility by reference to the replacement cost of an
F *item or part of a complex structure*

[40] Questions (iii), (iv) and (v) will be addressed together, as they all relate to the issue of the applicable measure of damages. Like question (ii), these questions also arise out of paras. 141 to 160 of the
G award. In setting out the issue in relation to these questions of law, I have adopted a substantial part of the plaintiff's submissions.

[41] The arbitrator dealt with the measure of damages at paras. 152 to 160 of the award. The arbitrator correctly identified the law on the measure of damages at paras. 152 to 154 of the award. At para. 155,
H the arbitrator stated the following:

In my view, the use of cost of reinstatement as the measure of damages to assess the compensation to the Respondent for the underperforming TOP plant is likely to be fraught with uncertainty. Any attempt to compute the reinstatement would be pure lottery.

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[42] The arbitrator then considered the case of *Ruxley Electronics and Construction Ltd v. Forsyth*[7] in paras. 156 to 158 of the award, stating the following at para. 158:

> If we are unable to ascertain the real cost to re-instate the TOP plant to the state where the contract specification been performed in full, the other viable option may be to determine the reasonable diminution in value of the plant in its defective state.

[43] The conclusion of the arbitrator is set out in paras. 159 and 160 of the award, which bears setting out in full:

> 159. In the instant case, there is no dispute that the TOP plant has failed to meet the performance specifications. Even though the secondary chamber had reportedly achieved the temperature of 1000°C required by the DOE, the closely intertwined working of the primary and secondary chambers in the burning process makes it difficult to isolate the real culprit that caused the defects. For example prolonged firing of the primary chambers as seen in longer than expected duration for each burn has the effect of raising the secondary chamber temperature to 1000°C. It is this prolonged firing of the primary chambers which has became [*sic*] the main cause of skyrocketing energy consumption and with it the cost. Lord Mustill in *Ruxley* supports an award of reasonable damages to the owner for loss of amenity emphasizing that the assessment of the amount to award must take into consideration what is reasonable. He expects there will be some differences in opinion as to what is the fair sum to award, but I would be unreasonable to deny recovery even if the amount is small. *In this case, the loss suffered by the Respondent is anything but small amount. The appropriate measure of damages is therefore not loss of amenity in Ruxley but a loss of utility*. It is my respectful view in this instant case that allowing the replacement cost of the primary chambers (RM6,159,180.00) and secondary chamber (RM3,079,590) is a reasonable compensation to the Respondent for the loss of use of the plant. I, however, dismiss their claim for the cost of testing and commissioning (RM2,976,937) because, in reality the defects lie in the primary and secondary chambers and its operation not the testing and commissioning itself.
>
> 160. In the circumstance, I award the Respondent the counterclaim of RM9,238,770.00 which is made up of the costs of replacement for the primary and secondary chambers. (emphasis added)

[44] The plaintiff argued that:

(a) there was no precedent for "loss of utility" as a measure of damages in breach of contract;

(b) even if "loss of utility" was sought to be equated with "loss of amenity", there was no basis for assessing such loss by reference to the "cost of replacement";

(c) the approach adopted by the arbitrator was at odds with the *dicta* of the House of Lords in *Ruxley* and that accordingly the arbitrator erred in law, and that the award must be set aside in part under s. 42(4)(d) of the Arbitration Act 2005.

[45] In the course of oral arguments, it was further submitted by counsels for the plaintiff that the arbitrator had conflated the issue of the measure of damages, on the one hand, and the issue of what evidence was available to support the claim for damages, on the other. That this was so, the learned counsels for the plaintiff averred, was evident from the fact that the arbitrator stated that any attempt to compute the reinstatement costs would be "pure lottery" and then selected diminution in value as the appropriate measure of damages for the plant in its defective state (see excerpts from paras. 155 and 158 of the award, reproduced at paras. 41 and 42, *ante*).

[46] Mr CW Lim for the plaintiff also pointed out that the "cost of replacement" used by the arbitrator actually referenced the milestone payments under the contract, which were payable upon the delivery to the site of the primary and secondary chambers. These milestone payments may not necessarily reflect the costs of the chambers.

[47] I am of the view that the arbitrator had erred in law by selecting diminution in value as the measure of damages because he considered it difficult to ascertain the reinstatement costs. The underlying principle in *Ruxley* is that of reasonableness of damages: reinstatement as a measure of damages would have given the house owner in *Ruxley* a windfall, particularly if he had not intended to effect reinstatement. At the same time, the use of diminution in value as a measure of damages would not have adequately compensated the owner, as the defect in construction would not have had any appreciable effect on the value of the house, and hence his loss would have been nil using this measure. It was therefore held that the owner would be entitled to damages to compensate for his loss of the amenity afforded by a deeper pool that would have resulted had the contractor followed his specifications.

[48] The following passage from the judgment of Lord Mustill in *Ruxley* makes this clear: A

> As my Lords have shown, the test of reasonableness plays a central part in determining the basis of recovery, and will indeed be decisive in a case such as the present when the cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered by the employer. But it would be equally unreasonable to deny all recovery for such a loss. The amount may be small, and since it cannot be quantified directly there may be room for difference of opinion about what it should be. But in several fields the judges are well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands. B C

[49] The arbitrator would have been entitled to select diminution in value or loss of amenity as a measure of damages because it was the most reasonable measure of damages, but not because it afforded the easiest means by which the damages may be ascertained. The choice of the measure of damages cannot be determined by the availability of evidence to support the claim for damages. D

[50] At the same time, to deny the counterclaim would not be just, as the defendant has suffered no small loss as a result of the plant not meeting the prescribed performance specifications. In my view, the most appropriate measure of damages would be reinstatement costs, which in this case would be the cost to either replace or modify the primary and secondary chambers in order for the plant to meet the performance specifications. That this cost is difficult to ascertain is no bar in this regard. E F

[51] I am of the view that the milestone payments would be representative of the actual costs of the primary and secondary chambers. However, I agree with Mr CW Lim for the plaintiff that to award the full costs of the chambers would not be correct, as there had not been a total failure of consideration on the part of the plaintiff. The question of proof of damages is addressed by the quanta specified in the schedule of payments in the contract. G

[52] For the reasons set out above, and in exercise of the powers under s. 42(4)(b) of the Arbitration Act 2005, I vary the award by reducing the amount awarded to the defendant under the counterclaim to RM4,619,385, being half the amount of the milestone payments in respect of the primary and secondary chambers. H

[53] The answers to questions (iii), (iv) and (v) are set out in the following table: I

Question (iii)	Whether the proper measure of damages for breach of contract resulting in a defective plant is the cost of reinstatement or the diminution in value
	The proper measure of damages in such circumstances should be the cost of reinstatement.
Question (iv)	Arising from the above, if the proper measure of damages is the cost of reinstatement, then, if that cost is not proven, is a tribunal entitled to award costs based on diminution in value, or is it confined to awarding nominal damages?
	In such circumstances, a tribunal is not entitled to award costs based on diminution in value. Proof of damages is addressed by the milestone payments specified in the contract. It is the view of the court that the relevant items of milestone payments specified in the contract would be representative of the actual costs of the primary and secondary chambers.
Question (v)	Whether it is allowable to calculate the measure of damages based on diminution in value/loss of utility by reference to the replacement cost of an item or part of a complex structure
	No, replacement cost would not be appropriate where the measure of damages is diminution in value.

[54] It is not necessary for me in the present instance to address the issue of whether "loss of utility" is a valid measure of damages. Nonetheless the following passage in Lord Mustill's speech in *Ruxley* bears closer examination:

> There are not two alternative measures of damage, at opposite poles, but only one; namely, the loss truly suffered by the promisee. In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' (see for example the valuable discussion by Harris,

> Ogus and Philips (1979) 95 L.Q.R. 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away.

[55] The "amenity" referred to in the speeches of the law Lords in *Ruxley* is sometimes referred to in economics as a consumer's utility, meaning the satisfaction that the consumer obtains from the consumption of goods or services. The arbitrator, in his award, appeared to distinguish "utility" from mere "amenity" in a way that suggests that the loss of utility was greater than a loss of amenity. Although there is some attraction in the proposition that the loss of utility connotes the loss of use of goods in one or more ways, whereas the mere loss of amenity simply affected one's personal enjoyment of the goods without affecting its value, I am of the view that it is not necessary for the law to be extended in this way, as a loss of utility in the manner suggested would necessarily result in a diminution of value of the goods.

Question (vi): Whether on a true construction, the contract between the parties was in fact a research and development project wherein the defendant assumed the risk of the technology not performing as expected

[56] Question (vi) arises out of paras. 30 to 73 of the award. The plaintiff argued that the arbitrator erred in his conclusion that the contract was a commercial agreement as opposed to a research and development effort.

[57] A preliminary point to be considered is whether this part of the award is subject to curial intervention in the first place, based on the principle that is sometimes known as the *Absalom* exception: where there has been a specific reference to an arbitral tribunal of a point of law (rather than a general reference of a dispute to arbitration), then the courts may not intervene in respect of the findings of the tribunal.

[58] At p. 15 of the award, the first issue on the defendant's list of issues to be determined by the arbitrator reads as follows:

> Whether the TOP Plant Contract between the Claimant and the Respondent is a turnkey contract or is it a research and development effort as alleged by the Claimant?

[59] The arbitrator reformulated the issues submitted by both the plaintiff and defendant and distilled them into seven main issues and related sub-issues. The first main issue was set out at p. 19 of the award:

A Main Issue No. 1: Whether the Claimant has entered into a commercial design and build contract/turnkey contract or a collaborative agreement?

[60] I am of the view that question (vi) of the questions of law posed to this court is in substance the same as the question that had been B posed to the arbitrator, as set out at p. 15 of the award, and reformulated at p. 19 of the award.

[61] Madam Chandra Devi for the defendant argued that since this was a question of law that had been specifically referred to and C determined by the arbitrator, it was not open to this court to re-examine the question. She referred the court to the case of *The Government of India v. Cairn Energy India Pty Ltd & Anor*[8], a decision of the Federal Court, from which the following passage is extracted:

[29] This court in *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* D [2004] 1 CLJ 743 upheld the distinction that was made in *Sharikat Pemborong (supra)* in the following terms - "As to the determination of whether the award has been improperly procured, this must depend on the issues or the questions that have been referred to the arbitrator. It is from these issues or questions that the arbitrator has to make findings of fact on the evidence adduced before him and more often E than not, questions of law arise from his findings of fact. It is under these circumstances that Raja Azlan Shah J in *Sharikat Pemborong* sounded a warning that reads as follows - 'It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The F wealth of authorities make a clear distinction between the two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'".

G [30] With respect we are not persuaded that we should depart from the long line of authorities holding such a distinction. *Thus, where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'.* However, if the matter is a general reference, interference may be possible 'if and when H any error appears on the face of the award'. (See: *Sharikat Pemborong Pertanian (supra)*). (See also: *King v. Duveen* [1913] 2 KB 32 and *Absalom Ltd v. Great Western (London) Garden Village Society, Ltd* [1933] AC 592). (emphasis added)

I **[62]** Mr Kamraj Nayagam for the plaintiff argued that the *Absalom* exception no longer applies in Malaysia, on the basis that:

(a) *Exceljade* established that, since the amendment to the Arbitration Act 2005 by the introduction of s. 42(1A), the proper test under s. 42 is whether a question of law or error of law arises out of the award that could substantially affect the rights of the parties, and not whether there has been an error on the face of the award.

(b) The *Absalom* exception operated as an exception to the "error on the face of the award" test, and therefore with the supplanting of this test in *Exceljade*, it necessarily means that the *Absalom* exception is also no longer applicable.

[63] He referred to the English case of *Dowans Holding v. Tanzania Electric Supply Co*[9] in support of his proposition.

[64] I disagree.

[65] *Dowans* in fact dealt with the position under the law prior to the introduction of the Arbitration Act 1996 of England, applying the "error on the face of the award" test. Burton J specifically reserved judgment on whether the *Absalom* exception would continue apply under the 1996 Act and proffered the following views:

> ..., even though the Tanzanian court will be applying, as it is obliged and entitled to do, the "old" test of entitlement to challenge an arbitration award by reference to error on the face of the award, nevertheless it will be entitled to take into account the more modern approach to arbitration adopted internationally. At the time of the decision in *Absalom*, it would appear clear that the courts would have been addressing a postulated ouster of the court's jurisdiction, by reference to the *Absalom* exception, and would have been, at that stage, astute to limit that exception. In the modern context, and particularly in the light of the New York Convention, it would be more likely that the courts would rather be astute to prevent an ouster of, or a limitation upon, the ambit of arbitrations, **and thus to expand, rather than to contract, the *Absalom* exception**. (emphasis added)

[66] It is therefore the considered opinion of this court that there is nothing in the cited cases that support the proposition that the *Absalom* exception no longer applies in Malaysia post-*Exceljade*. Accordingly, where a specific matter has been referred to arbitration for consideration, no interference by the courts is possible on grounds that the decision on the question of law was an erroneous one.

[67] I would therefore conclude that, as:

(a) Question (vi) is a question of construction of the contract, and is therefore a question of law; and

(b) this specific question of law had already been referred to the arbitrator;

the decision of the arbitrator is not open to challenge, except in the extremely limited circumstances identified by the Federal Court in *Ganda Edible Oils Sdn Bhd v. Transgrain BV*[10], where "the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance".

[68] I find that, having read and considered the award, the arbitrator has not proceeded illegally in this matter.

Question (vii): Where a contract that specifies that municipal waste of specified characteristics and parameters is to be treated and also specifies the amount to be treated and the limits of energy consumption, is it a condition precedent to contractual performance that waste within the specified characteristics and parameters be provided for testing the functionality of the plant?

[69] Question (vii) also arises out of paras. 30 to 73 of the award.

[70] The plaintiff argued that the arbitrator erred in his interpretation of the waste characteristics as provided in the performance specifications of the contract, and its effect on the performance of the plant. Based on a proper construction of the contract, the plaintiff argued, the provision of waste that conformed to the prescribed waste characteristics was a condition precedent to contractual performance by the plaintiff.

[71] The defendant's counter argument was that the contract was a turnkey contract, and therefore it was the responsibility of the plaintiff to ensure that the plant was capable of treating whatever waste that was being collected by the Labuan municipality.

[72] The arbitrator found favour with the defendant's position in the following extracts from paras. 57 and 69 of the award:

> Here, the turnkey contractor is obliged to design and build the Labuan TOP Plant to treat a largely non-homogenous and seasonally varied unsorted municipal solid waste or MSW. The Claimant's plant not only has to handle unsorted MSW that has significant sectorial difference in waste characteristics, see Table 4.3 below, but it must also be able to treat waste that are varied seasonally i.e. waste characteristics during the various festive periods, the monsoon period, etc.
>
> [A]s the turnkey contractor, the Claimant's legal obligation is to design the plant fit for the purpose for which it was contracted for [*sic*].

[73] The construction of a contract is a question of law. The first issue for my consideration is whether the arbitrator has correctly identified the law, and then secondly, whether he has correctly applied the law to the facts. I may only interfere with the award if the answer arrived at by the arbitrator is outside the range of possible correct answers in this case.

[74] The arbitrator reviewed the applicable law relating to turnkey and design and build contracts at paras. 69 to 71 of the award. I find that the arbitrator has not erred in stating the law.

[75] I do however find that the arbitrator has erred in applying the law to the facts. My reasons are as follows:

(a) Although the arbitrator quoted an extract of the judgment in *Ganad Corporation Bhd v. Flobright Trading Sdn Bhd & Anor*[11] in which the learned judge cautions that a turnkey contract is not a term of art, the arbitrator nonetheless proceeded to hold the plaintiff liable to ensure that the plant was capable of processing waste of whatever characteristics that were being produced in Labuan.

(b) This interpretation cannot be correct, as otherwise, there would have been no need to specify the detailed waste characteristics in Table 4.3 in the contract. The contract could have simply stated that the plant must meet the performance specifications, whatever the composition of the waste stream in Labuan. Instead, a detailed study had been carried out by MINT on behalf of the defendant to analyse the waste characteristics present in Labuan, with the results of the analysis included in Table 4.3.

[76] The next question for consideration is the question of law posed by the plaintiff: was the presence of waste that conformed to the contracted waste characteristics a condition precedent to the contract?

[77] I accept the plaintiff's submission that a term of a contract need not be referred to or expressly set out as a "condition precedent" for it to be effective as a condition precedent. The key issue is construing the intent of the parties in including the term in question.

[78] Conditions precedent are a set of specified events or circumstances that must exist before certain other specified obligations can come into being. Black's[12] defines a condition precedent as:

> An act or event, other than a lapse of time, that must exist or occur before a duty to perform arises. If the condition does not occur and is not excused, the promised performance need not be rendered.

[79] In other words, the parties must have intended for the performance of some or all of the obligations under a contract to be excused if the events specified do not come to pass.

[80] In the present case, I find the parties could not have intended for the obligation of the plaintiff to deliver a waste treatment plant that conformed to the performance specifications to be excused if the waste characteristics did not conform to Table 4.3. The waste characteristics prescribed by Table 4.3 were not conditions precedent, but must instead be read to form an integral part of the performance specifications for the plant.

[81] Unless and until the plant met the performance specifications, the plaintiff cannot be said to have discharged its obligations under the contract.

[82] At the same time, it is clear that there was no obligation placed on the defendant under the contract to ensure that the waste that conformed to the characteristics in Table 4.3 was delivered to the plant.

[83] Accordingly, for the reasons set out in the preceding paragraphs, the answer to question (vii) of the questions of law posed by the plaintiff is answered in the negative. Although I find that the arbitrator has erred in taking the view that because the contract is a turnkey or design and build contract, the plant must therefore be capable of handling waste of whatever nature being produced in Labuan, this error has no bearing on my conclusion that the provision of waste within the specified characteristics and parameters is not a condition precedent for testing the functionality of the plant.

[84] It follows that, immediately following the re-commissioning, the obligation of the plaintiff to deliver a plant meeting the performance specifications remained executory. The next issue is whether the termination by the defendant was lawful. This is addressed in the following paragraphs.

Question (ix): Whether it was a condition precedent to determination of the contract pursuant to cl. 53.1(iii), that a proper testing and commissioning of the plant as prescribed by cl. 46 of the contract, be carried out

[85] Questions (ix), (x) and (x) arise out of paras. 88 to 103 of the award.

[86] The plaintiff contended that the arbitrator failed to appreciate the correlation between cls. 53.1(iii) and 46 of the contract. These clauses, it argued, provide that a proper testing and commissioning of the plant was a condition precedent to a determination of the contract.

[87] The plaintiff's position was that the re-commissioning was not a proper testing and commissioning for the purposes of cl. 46 due to the adverse conditions in which the re-commissioning was carried out (which had resulted in the water content of the waste being higher than the contracted specifications).

[88] Clause 46 provided for requirements of testing and commissioning the plant. It is pertinent to note that the costs of testing were deemed to have been included in the contract sum, which meant that the plaintiff as the contractor was to have borne such costs. Clause 53.1(iii) of the contract provided as follows:

> 53.1 Defaults of Contractor
>
> Without prejudice to any other rights or remedies which the Government may possess, if the Contractor shall make default in any one or more of the following respects, that is to say:
>
> …
>
> iii) if he refuses to execute the Works in accordance with the Contract or persistently neglects to carry out his obligations under the Contract, or
>
> …
>
> then the Officer named in Appendix 1 may give to him a notice by registered post or by recorded delivery specifying this default, and if the Contractor shall either continue such default for fourteen (14) days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the Officer named in Appendix 1 may thereupon by notice sent by registered post or by recorded delivery determine the employment of the Contractor under this Contract.

[89] The relevant paragraphs of the award are reproduced below:

> 101. Plain reading of Clauses 46.1 and 46.2 of the Contract suggests to me that successful completion of testing and commissioning, i.e. that the T&C test results shows that the operation of the plant has met the performance specifications, are conditions precedent to the handing over of the plant to the Respondent. The prescription in Clause 46.2 of the contractor's duty to remedy the deficiencies further fortifies my view that the parties have agreed that the testing and commissioning is not a 'warranty' but a 'condition' in this contract. I am also of the view that the Claimant has not proven that the alleged variation of the Labuan waste is not the dominant or primary cause of the Claimant's non-compliance with the contact performance specifications. It is the tribunal's opinion that substantial completion

A has not been achieved by the Claimant because of its failure to comply fully with performance specifications. A breach of this mandatory provision, which goes to the root of the contract, entitles the Employer to determine the employment of the contractor. It is my respectful view that in a process plant where testing and commissioning is the only acceptable mode of demonstrating whether a plant has met the
B performance specifications, a reconstituted waste stream similar to the waste stream in Table 4.3 should have been used by the claimant to eliminate design and constructions flaws in the plant as the dominant cause of shortfall in performance.

102. Based on the aforesaid reasons, the Respondent is entitled in law
C and in fact to terminate the contract in the face of the Claimant's persistent refusal to rectify the plant to meet the performance specifications. Procedurally, there is no dispute that the Respondent had complied fully with the contractually required procedures before and in the actual termination itself.

D **[90]** The question before me is whether the arbitrator had correctly identified the law relating to termination of contracts, and whether he had correctly applied the law to the facts in holding that the termination of the contract by the defendant pursuant to cl. 53.1(iii) of the contract was lawful.

E

[91] I can find no fault with the exposition of the laws by the arbitrator, either in paras. 101 and 102 of the award (reproduced above) or paras. 93 to 96 (where the arbitrator reviewed the law relating to repudiation of contracts and fundamental breach).

F **[92]** Before I consider the application of the law by the arbitrator, the following points should be noted:

(a) the arbitral award should be read as a whole in a fair and reasonable way, and I should not engage in a minute textual analysis of the award (see *Kershaw Mechanical Services Ltd v. Kendrick Construction*[13];
G and

(b) it is pertinent that the arbitrator discussed renunciation and refusal to perform at paras. 93 and 94 of the award, and also refers to the plaintiff's "persistent refusal to rectify the plant to meet the
H performance specifications" at para. 102 of the award.

[93] The facts surrounding the termination of the contract, as established by the arbitrator, are set out in para. 25 of the award, which describes the events following the re-commissioning:

I 25. In the ensuring weeks, the Claimant appealed to the Respondent to accept lower performance standards for the operation of the plant. However, the Respondent was not agreeable to lower performance

specifications of the plant, and instead on 10th September 2004 offer [*sic*] to give the Claimant another opportunity to prove the performance of its plant by undertaking a two week production-run operation. The Respondent believed then that the Claimant could have a better idea of where to improve the plant's operations during the production run as opposed to the 3 days allocated for testing and commissioning. However, the requirement that the Claimant bear the full costs of the production run scuttled the proposal. Over the next one year or so, the Claimant and the Respondent attempted without success to find a common platform to resolve this dispute of the shortfall in plant performance. On 11th May 2005, following the notice of intention to terminate the Claimant's contract and the Claimant's alleged inability/and or refusal to rectify the breach, the Respondent terminated the employment of the Claimant under this contract, This termination resulted in the forfeiture of the Claimant's performance bond.

[94] Following the re-commissioning, the plaintiff's obligation to deliver a plant that complied with the performance specifications remained executory. The plaintiff had requested the defendant to accept lower performance specifications, which the defendant refused. The plaintiff was not willing to bear the costs of the production run, notwithstanding its obligations under cl. 46(1) of the contract. The defendants subsequently terminated the contract.

[95] Considering the award as a whole in the context of the findings of facts of the arbitrator, I am of the view that the arbitrator had not erred in law by concluding that the contract was lawfully terminated pursuant to cl. 53.1(iii) of the contract. The arbitrator would have been entitled to conclude that the contract had been lawfully terminated on grounds that the plaintiff had repudiated the contract by refusing to conduct and bear the costs of the production run to establish that the plant met the contracted performance specifications.

[96] Question (ix) of the questions of law posed by the plaintiff is therefore answered in the negative.

[97] Clause 53.1(iii) clearly entitled the employer to terminate the contract if the contractor refused to perform its obligations under the contract. This ability to terminate cannot be predicated on proper testing and commissioning of plant having been carried out. Where for example, the contractor refuses to conduct a proper test, then the right of termination under cl. 53.1(iii) may properly be exercised.

Question (x): Whether the arbitrator failed to direct his mind to the contractual requirement that a proper testing and commissioning of the plant was a condition precedent to determination of the contract by the defendant and failed to make a finding that the testing and commissioning that was purported to have been carried out from 10 May 2004 to 17 May 2004 (re-commissioning) under the supervision and direction of KLIAB on behalf of the defendant was not a proper cl. 46 testing and commissioning

[98] This question does not arise in the light of my answer to question (ix). A proper testing and commissioning was not a condition precedent to the exercise of the right of termination where, for example, there has been a repudiation or anticipatory breach of the terms of the contract.

Question (xi): If the re-commissioning was not proper, was the purported determination of the contract based on the results of the improper testing and commissioning, valid?

[99] The determination of the contract by the defendant was valid for the reasons explained in paras. 88 to 97, *ante*. The answer to this question (xi) is therefore yes.

Breach Of Natural Justice

[100] The plaintiff has also applied for the award to be set aside pursuant to s. 37 of the Arbitration Act 2005, on the grounds that the arbitrator has relied in his analysis on cases not put to the parties for their comments, and in so doing breached the rules of natural justice.

[101] Section 37 of the Arbitration Act 2005 provides:

> 37. Application for setting aside
>
> (1) An award may be set aside by the High Court only if:
>
> (a) the party making the application provides proof that:
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; A

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

B

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or C

(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia. D

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or E

(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award. F

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

G

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

H

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

I

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.

[102] The defendant made the preliminary point that the plaintiff did not specify which limb of s. 37 that it was relying on, and that accordingly the plaintiff's application should not succeed. Order 7 r. 2(1A) of the Rules of Court 2012 requires an originating summons to state in its intitulement the provision of the written law under which the application to court is being made. Similarly, O. 69 r. 4(1)(d) requires an originating summon for an arbitration claim to specify the section of the Arbitration Act 2005 under which the claim is made.

[103] The defendant cited *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd*[14] in support of its position, where Hamid Sultan Abu Backer JC (as His Lordship then was) said:

> It is a condition precedent, when a party relies on any of the sub-section under s. 37 of AA 2005 there is a duty and obligation in law to clearly identify the sub-section, set out the facts leading to the grounds which is recognized in the said section. This was not done in the instant case. The averments in the affidavits are all lumped up unintelligibly paving the path to prolixity. Prolixity is not condoned by courts.

[104] A wrong intitulement in a summons renders the summons irregular (see *Voon Nam Kwong & Anor v. Selamat Maju Jaya Sdn Bhd*[15]). An irregularity is subject to the curative powers of the court under O. 2 r. 1 of the Rules of Court 2012.

[105] In the present instance, the plaintiff specified breach of natural justice in the grounds of the originating summons, and the affidavit in reply affirmed on 6 December 2013 by an employee of the defendant made it clear that the defendant also understood the issue. This case in my view book-ends the opposite end of the spectrum from the *Taman Bandar Masai Baru* case. I consider that, having regard to the substantial merits of the present case and the interests of justice, this is an appropriate instance for the exercise of the curative powers of this court under O. 2 r. 1 of the Rules of Court 2012.

[106] Dealing now with the substance of the plaintiff's application under s. 37: the arbitrator at paras. 33 to 37 of the award referred to the following three cases: *Swainland Builders Ltd v. Freehold Properties Ltd*[16], *River Wear Commissioners v. Adamson*[17] and *Mannai Investment Co Ltd v. Eagle Star Assurance Co Ltd*[18]. These cases were not cited by the parties in their submissions, and no prior notice was given by the arbitrator to the parties that he was going to refer to these cases. Accordingly, the parties did not have an opportunity to consider or to make submissions on these cases.

[107] The arbitrator discussed these cases in the context of the current legal principles for the interpretation of legal instruments.

[108] The plaintiff contended that the actions by the arbitrator in referring to these cases has resulted in a breach of natural justice and that I should as a consequence set aside the award. The plaintiff cited the English case of *London Underground Ltd v. Citylink Telecommunications Ltd*[19], which quoted the following passage in the New Zealand case of *Methanex Motunui v. Spellman*[20]:

> To summarise, the scope of notice and response rights at common law can be stated in broad terms only, because each case must be tailored to the circumstances of the particular case. The overriding objective is to avoid surprise, and therefore lack of opportunity to respond in the way that the parties had envisaged when setting up the arbitration. The following are illustrations of that principle ...:
>
> ...
>
> (b) In the absence of agreement to the contrary, *non-expert arbitrators must confine themselves to the evidence provided by the parties unless judicial notice would have been possible in conventional courts*. The same applies to the observations and knowledge of expert arbitrators concerning facts specific to the particular dispute, any general matters that fall outside their area of expertise, and any reports or opinions obtained from others.
>
> (c) An expert arbitrator is entitled to draw on his or her knowledge and experience to supplement the facts drawn from party-sourced evidence, and without prior notice to the parties, provided that the additional facts are ones of general application as distinct from those specific to the particular dispute.
>
> (d) In general an arbitrator must provide notice of, and an opportunity to respond to, issues ideas, methods, research, investigations and/or studies of the arbitrator that were not reasonably foreseeable in the light of the arguments traversed before the arbitrator. (emphasis added)

[109] In the course of oral submissions, Mr Kamraj Nayagam for the plaintiff contended that it was not necessary for the plaintiff to show that it had suffered prejudice as a result of the actions of the arbitrator in referring to these cases. It was sufficient, he argued, that the cases were referred to and that no opportunity was given to the parties to consider or to submit on these cases, as "any denial of natural justice is a prejudice".

[110] In response, the counsel for the defendant referred me to the case of *Taman Bandar Baru Masai*, which states that curial intervention of an arbitral award under s. 37 must be subject to proof having been provided. Accordingly, the learned counsel for defendant submitted, since no proof of prejudice has been provided by the plaintiff, the plaintiff's application must necessarily fail.

[111] Guidance on the approach to be adopted by this court in considering an application under s. 37 can be found in the following passage of the judgment of Ramly Ali JCA in *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-link Sdn Bhd & Another Appeal*[21]:

> Section 37(1) of the Arbitration Act 2005 provides for the various grounds on which an arbitral award may be set aside. **The onus is on the party making the application to provide proof**. The court's discretion in setting aside arbitral award is now limited to the narrowly defined circumstances in line with the modern international arbitral practice. *The effect of the present ss. 8, 9, 37 and 42 of the Arbitration Act 2005 is that the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene*. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and refrain from approaching the court to set it aside. Constant interference of the court as was the case in the past will defeat the spirit of the Arbitration Act 2005 which is for all intent and purpose to promote one-stop adjudication in line with the international practice. (emphasis added)

[112] With respect, I do not consider that the proposition of law suggested by the counsel for the plaintiff correctly reflects legal position. For the court to intervene under s. 37(1)(b) of the Arbitration Act 2005, the plaintiff must show that it had suffered prejudice by the actions of the arbitrator. The correct proposition is not that "any denial of natural justice is a prejudice", but rather that there must be prejudice for there to be a breach of natural justice. I base my conclusion on the two Malaysian cases cited in the preceding paragraphs.

[113] The next question for me to consider is whether the plaintiff had in fact been prejudiced by the fact that the arbitrator referred to the three cases without giving the parties an opportunity to consider those cases. In my view, the plaintiff had suffered no prejudice, for the following reasons:

(a) The first reference to the *Mannai Investment* case at para. 30 of the award was in fact a citation in the judgment of Lord Hoffmann in *Investor Compensation Scheme Ltd v. West Bromwich Building Society*[22], which the arbitrator had reproduced verbatim. Nothing therefore turns on this.

(b) The arbitrator discussed the *Swainland* case, at para. 33 of the award, in the context of rectification of contracts, which was not relevant to the plaintiff's case. In any event, the precise passage quoted in the award from the judgment of Gibson LJ from *Swainland* was also reproduced in the judgment of Lord Hoffmann in *Chartbrook Ltd v. Persimmon Homes Ltd*[23], of which case the parties had notice.

(c) The *River Wear* case was also referred to in *Chartbrook*. The substance of the passage quoted in para. 34 of the award was summarised in the judgment of Lord Hope in *Chartbrook*[24], and so did not introduce any new issue that necessitated a response from the parties. The passage quoted did not add anything further to the "matrix of fact" principle.

[114] It is view of this court that the principles enunciated in the New Zealand case of *Methanex* should not be considered to be hard principles of law, but rather guidelines of general application, from which the court may depart in the interests of the justice of the case. I should also add that the learned counsels for the plaintiff stopped short of suggesting that the arbitrator, who is legally qualified but is not a legal practitioner, was a non-expert arbitrator coming within para. (b) of the passage quoted in *Methanex*.

[115] For the reasons set out above, I dismiss the plaintiff's application under s. 37(1)(b) of the Arbitration Act 2005 to set aside the arbitral award.

Summary And Conclusion

[116] The following table summarises the answers to the questions of law posed to this court.

Question (i)	Whether on a true construction of the contract between the parties, the plaintiff, having completed all the physical works called for under that contract, was entitled to the balance of the revised lump sum contract price of RM28,497,042.53, amounting to RM2,730,664.22
	No, on the basis that there was no substantial performance of the contract. See paras. 28 to 34, *ante*.
Question (ii)	Whether it was incumbent on the defendant, having pleaded counterclaim for damages in the sum of RM13,000,000 to prove the quantum of damages claimed
	Yes. See paras. 37 and 38, *ante*.
Question (iii)	Whether the proper measure of damages for breach of contract resulting in a defective plant is the cost of reinstatement or the diminution in value
	The proper measure of damages in such circumstances should be the cost of reinstatement. See paras. 47 to 52, *ante*.
Question (iv)	Arising from the above, if the proper measure of damages is the cost of reinstatement, then, if that cost is not proven, is a tribunal entitled to award costs based on diminution in value, or is it confined to awarding nominal damages?
	In such circumstances, a tribunal is not entitled to award costs based on diminution in value. Proof of damages is addressed by the milestone payments specified in the contract. It is the view of the court that the relevant items of milestone payments specified in the contract would be representative of the actual costs of the primary and secondary chambers. See paras. 47 to 52, *ante*.
Question (v)	Whether it is allowable to calculate the measure of damages based on diminution in value/loss of utility by reference to the replacement cost of an item or part of a complex structure
	No, replacement cost would not be appropriate where the measure of damages is diminution in value. See paras. 47 to 52, *ante*.

Question (vi)	Whether on a true construction, the contract between the parties was in fact a research and development project wherein the defendant assumed the risk of the technology not performing as expected
	This specific question of law had already been referred to and determined by the arbitrator, and hence is not open to challenge in this court, based on the *Absalom* exception. See paras. 65 to 68, *ante*.
Question (vii)	Where a contract that specifies that municipal waste of specified characteristics and parameters is to be treated and also specifies the amount to be treated and the limits of energy consumption, is it a condition precedent to contractual performance that waste within the specified characteristics and parameters be provided for testing the functionality of the plant?
	No. The waste characteristics must be read as forming an integral part of the performance specifications. See paras. 76 to 82, *ante*.
Question (ix)	Whether it was a condition precedent to determination of the contract pursuant to cl. 53.1(iii), that a proper testing and commissioning of the plant as prescribed by cl. 46 of the contract, be carried out
	No. See paras. 88 to 97, *ante*.
Question (x)	Whether the arbitrator failed to direct his mind to the contractual requirement that a proper testing and commissioning of the plant was a condition precedent to determination of the contract by the defendant and failed to make a finding that the testing and re-commissioning that was purported to have been carried out from 10 May 2004 to 17 May 2004 under the supervision and direction of KLIA Berhad on behalf of the defendant was not a proper cl. 46 testing and commissioning
	This question does not arise in the light of my answer to question (ix). A proper testing and commissioning was not a condition precedent to the exercise of the right of termination.

Question (xi)	If the re-commissioning was not proper, was the purported determination of the contract based on the results of the improper testing and commissioning, valid?
	Yes. See paras. 88 to 97, and 99, *ante*.

[117] In exercise of the powers under s. 42(4) of the Arbitration Act 2005, I hereby vary the award of the arbitrator, Mr Chong Thaw Sing, dated 15 July 2013 by reducing the amount awarded in respect of the counterclaim to RM4,619,385. All other aspects of the award are unaffected.

[118] The application by the plaintiff under s. 37 to set aside the award is dismissed.

[119] Each party shall bear its own costs in this action.

Endnotes:

1. [2014] 1 AMR 253
2. [1983] 1 WLR 1469
3. [1952] 2 All ER 176
4. [1963] 1 LNS 118; [1969] 29 MLJ 305
5. [2008] 4 MLJ 157
6. [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360
7. [1995] 3 All ER 268
8. [2012] 3 CLJ 423; [2011] 6 MLJ 441
9. [2011] EWHC 1957 (Comm)
10. [1987] 2 CLJ 394; [1987] CLJ (Rep) 95
11. [2000] 1 LNS 117; [2000] 6 MLJ 830
12. *Black's Law Dictionary*, 7th edn.
13. [2006] EWHC 727
14. [2010] 5 CLJ 83, at 99
15. [2002] 6 CLJ 453
16. [2002] 2 EGLR 71
17. [1877] 2 App Cas 743
18. [1997] AC 749

19. [2007] EWHC 1749 (TCC)
20. [2004] 1 NZLR 95
21. [2013] 2 CLJ 395
22. [1998] 1 All ER 115
23. [2009] 1 AC 1101, at 1123B
24. *ibid*., at 1109H